Filed 12/30/04 In re Daisy B. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re DASIY B. et al., Persons Coming Under the Juvenile Court Law.	B173563 (Los Angeles County Super. Ct. No. CK48710)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. JOSE B., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Joan Carney, Juvenile Court Referee. Affirmed.

Kate M. Chandler, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of County Counsel, Larry Cory, Assistant County Counsel, and Sterling Honea, Principal Deputy County Counsel, for Plaintiff and Respondent.

Appellant, Jose B., is the father of Daisy, Desiree and Jazmin.[1] In this appeal he challenges the findings and orders made at a Welfare and Institutions Code[2] section 364 review hearing, at which the juvenile court terminated jurisdiction and issued family law exit orders. The exit orders granted sole physical custody to the children's mother, joint legal custody to both parents and gave appellant visitation every other weekend. The order also gave appellant visitation on alternating holidays and part of the children's school vacations.

COMBINED STATEMENT OF THE CASE AND FACTS

On April 16, 2002, the Department of Children and Family Services (DCFS or Department) filed a section 300 petition on behalf of appellant's three children: Daisy, born June 1992, Desiree, born November 1994, and Jazmin, born December 1996. The petition alleged that the children were persons described by section 300, subdivisions (a), (b) (i) and (j). The petition alleged that appellant had used inappropriate discipline on the three girls. The petition also alleged that appellant had a history of engaging in domestic conflicts with the mother.

The children came to the attention of the Department on April 16, 2002 when Daisy reported the social worker that her father hit her, her sisters and mother all the time. Daisy also claimed that appellant smoke and drank in front of them, although he did not get drunk. Appellant would discipline the girls by using a belt on their buttocks. Daisy reported that she was "very afraid of her father and did not want to see him." Desiree also stated that she was afraid of appellant because of the physical abuse inflicted by him on her sisters and mother. Jazmin stated that she wanted to live with both of her parents, but also confirmed that appellant hit her, her sisters and mother, and indicated

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[1] The mother (Marisela B.) is not a party to this appeal. The court found appellant to be the children's presumed father.

[2] All undesignated statutory references are to the Welfare and Institutions Code.

that although he did this, she was not afraid of him. Mother and the girls were living in a domestic violence shelter.

At the detention hearing, the court found that the Department had made a prima facie case for detaining the children and that a substantial danger existed to the children's physical and emotional health if they were not removed from appellant's custody. The court ordered the three girls placed with their mother. The court also issued a mutual restraining order for the parents and limited appellant's visitation with his daughters to monitored visits with a DCFS approved monitor. The matter was continued for a pre-trial resolution conference. Appellant did not object to the girls being placed with their mother.

For the next hearing, DCFS prepared a jurisdiction/disposition report dated May 24, 2002. The report stated that all three girls resided with their mother in a domestic violence center. A DCFS investigation revealed that the mother had no criminal history and that there was no prior dependency history. Appellant had a prior conviction for taking a vehicle without permission. The girls again told the social worker that appellant hit them on a consistent basis and also pulled their hair and called them names. Both Daisy and Desiree were afraid of appellant and did not wish to live with him. Daisy did not want to visit appellant. DCFS recommended that the girls remain with their mother and indicated that it would be safer for them if appellant did not reside with them.

On May 24, 2002, both parents submitted on the evidence[3] and the court sustained the petition as amended. Prior to appellant submitting the matter the court informed him the girls would be placed with their mother. The court described the children as dependents pursuant to section 300, subdivisions (a) and (b).

Immediately after the adjudication of the petition, the court proceeded to make the disposition orders. The court ordered all three children be placed with their mother. Reunification services were ordered for both parents. The case plan required appellant to

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[3] *In re Malinda S.* (1990) 51 Cal.3d 368.

attend parent education classes, individual counseling to address adult and parental responsibilities and anger management classes to address domestic violence issues. The court granted appellant monitored visits in a neutral setting and re-issued the restraining order against appellant. The court then continued the case for a section 364 judicial review.

On September 25, 2002, appellant filed a section 388 petition requesting that the restraining order be lifted and that he be allowed unmonitored contact with the children and contact with the mother. The court set a hearing on appellant's section 388 petition. The stated reason for the request was that mother purportedly wanted to reunite with appellant, appellant had almost completed parenting classes, and was involved in therapy and anger management. Attached to the petition was a letter from mother to her attorney asking that the court dissolve the restraining order and stating she wanted to get back together with appellant.

DCFS prepared a report for the 388 hearing. The report stated that mother did not want to reunite with appellant. Mother wanted the court to help appellant and was waiting to see if he improved based on the court's intervention. For her part, mother was learning English and job skills as well as attending therapy. Mother denied writing or signing the letter attached to appellant's 388 petition. The children stated they did not want to return to appellant. The shelter indicated that mother was a victim of domestic violence and recommended that the court grant her physical and legal custody of the children.

On November 6, 2002, the court denied appellant's 388 petition. The court ordered that the restraining order be lifted so that the parents could attend conjoint therapy and ordered appellant to see a licensed therapist. During the hearing, Daisy spontaneously told the court that the social worker had advised her to say that she and her sisters wanted to stay with their mother because appellant might hurt them even more. The social worker told the children that appellant was a bad man.

On November 22, 2002, the court conducted a section 364 review hearing and found that conditions existed which justified the continuance of its jurisdiction. The court granted DCFS discretion to allow appellant to have monitored visitation through his residential treatment program. The judicial review report advised that the children continued to reside with their mother. DCFS reported that although appellant was attending anger management and individual counseling, he still had control issues. During the past period of supervision, appellant had monitored visits with his daughters, although at the time the DCFS report was prepared, he had not visited the girls for the last three months because he could not agree on a monitor.

A judicial review was conducted on May 23, 2003. According to the DCFS report prepared for the hearing, all three children continued to reside with their mother. Daisy now wanted to live with appellant and did not want to go to court anymore because she did not want to live in the shelter where they were residing. Jazmin indicated that she wanted to continue to live with her mother and sisters, but wanted to visit appellant. Desiree stated she wanted to live with appellant because she did not like the environment where she was living. Mother stated that she would rather remain alone than go back with appellant because she did not feel appellant had changed and she did not want to live like they did before.

Appellant did not want to give a statement to the social workers. DCFS reported that during the past six months of supervision, appellant had not fully complied with the case plan nor did he make contact with the social worker during the months of January through March because he was "evangelizing." It was further reported that the children did not have any contact with appellant during the previous six months because appellant did not provide them with a telephone number where he could be reached. DCFS continued to recommend that the girls remain placed with their mother and that family maintenance services be provided.

At the hearing, the court found that conditions existed that justified continuance of its jurisdiction. Appellant asked for unmonitored visitation with the children based on

their statements to the social worker. Additionally, the children's counsel represented to the court that the children were not afraid of their father and wanted to live with and/or visit him. According to minor's counsel, the main conflict in the family was between the mother and appellant, not between the children and appellant. The court awarded appellant five hours of unmonitored visits. At the request of minor's counsel, the court also granted conjoint counseling between appellant and the children. The court reissued the restraining order against appellant. The court then continued the section 364 review hearing to June 27, 2003 for the purpose of deciding whether to terminate reunification services and the nature and extent of appellant's visitation.

The DCFS supplemental report prepared for the June 27 hearing informed the court that all three girls continued to reside with mother. The report advised that appellant had missed two visits with the children and had not called in advance to warn that he was not coming and had not called to reschedule. Appellant was not attending individual or conjoint counseling and did not have a telephone number where the social worker could reach him. It was the social worker's opinion that appellant had not learned to apply what he gathered from services to his actual parenting. Appellant had attended twenty-two sessions of anger management and indicated that he was going to change to a different program with the Victory Outreach Evangelistic Program. It was the Department's understanding that Victory Outreach did not offer anger management. The Department recommended continued family maintenance service for the girls with their mother and that the court terminate reunification services.

At the hearing appellant testified that he lived with his mother, father and three sisters and every other week his two nephews. Appellant found it difficult without a car to travel from Compton to the San Fernando Valley to visit the children. Moreover, his grandmother had required surgery and the social worker had not given him a bus pass thus, he was only able to attend one visit. He wanted to develop his relationship with his daughters and thus, he was asking for overnight weekend visits to occur at his mother's home. Appellant testified that the social worker had never observed him with his

children and would have no way of concluding that he failed to apply what he had learned in reunification to his relationship with them. Appellant's opinion was that the visits with his children were going well. They had lots of fun with him and were physically affectionate to him.

Appellant submitted on the termination of reunification services on the condition that the court order the Department to evaluate his mother's home. The court terminated reunification services and ordered the Department to evaluate the home of appellant's parents and to give appellant referrals to an anger management program. It ordered appellant to complete an anger management program that addresses domestic violence.

On June 27, 2003, appellant testified and told the court that he wanted to have "some kind of relationship" with his children and wanted them to be able to spend the weekend with him. The court issued the following order: "I'm going to make the finding that reunification services are terminated; that there's been a failure to substantially comply, and he's not in a position as we speak to take these children. Now, what we're going to do. I'm going to set it over for further 364." The girls all said that visits with their father were going well and that they all wanted more time with him.

On December 19, 2003, the 364 review hearing was conducted. On this date, the recommendation of the Department was for termination of jurisdiction, that the children remain in the custody of their mother and for appellant to continue with his unmonitored visitation. Further, the Department recommended that there be a family law order with joint legal custody and sole physical custody to mother. The court agreed to add overnight visitation. The children all confirmed they wanted additional visitation with appellant.

> "The Court: Everybody has done a good job. Jurisdiction is terminated, and I'll stay the order until January 5th. At which time they'll give us a family law order and we'll sign it for you."

On January 5, 2004, the parents were not in agreement on a resolution involving visitation and custody. The juvenile court elected to send them to mediation and to continue the case for one month.

The case was set for a contested family law order on February 6, 2004. At that hearing all parties were represented, but the children were not present. During the hearing the following discussion occurred:

> Appellant's counsel: "The appellant wants to get custody of his oldest child Daisy, and he's unhappy with the fact that she's not here today even though we know that the court did order the attorney for the minors' to interview them and be able to express in open court what their desires were. But he wants custody of Daisy."
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> [¶] . . . [¶]
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> Minor's counsel: "Daisy, I think if she had her preference, would like to split the time 50/50."
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> [¶] . . . [¶]
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> Appellant's counsel: "[O]ur position that we need to hear directly from Daisy B., who is the oldest child. And I heard the comments by her counselor. It is still our belief that if Daisy were here to testify, she would make it very clear that she wants to live with her father."
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> [¶]. . . [¶]
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> The Court: "All right. And this is the way the court sees it. The presumption has not been rebutted. Even though Mr. [B.] has attended 22 anger management classes and is with the Victory Outreach Program, it is apparently [*sic*] to this court from watching his performances in court that his anger is very, very, -- very, very close to the surface. He's probably going to have that problem the rest of his life.

"Daisy is very attached to her father. I've seen that when she comes into the courtroom. I've seen it. There's no question about that. Daisy, thus far the testimony I've received, has made three choices, three different choices. Dad says she says she wants to come with him. She may very well have said that. Mom says that she says she doesn't want to come with him. She may very well have said that. And to her lawyer, she's 50/50. Maybe yes, Maybe No.

"I do not think it's in Daisy's best interest for the father to have legal custody, physical custody of her at this time. I think their relationship is continuing to develop. I think that the children enjoy visiting with Dad and being with him, but I do not think that it's in Daisy's best interest to be with Dad nor the other two children."

Appellant filed a timely notice of appeal as to the termination of jurisdiction over Daisy.

CONTENTIONS ON APPEAL

Appellant's contentions

Appellant challenges the decision of the juvenile court awarding sole physical custody of his daughter, Daisy, to her mother and then terminating juvenile court jurisdiction. Appellant raises several different objections to the orders of the trial court. Specifically, appellant contends: 1) The juvenile court used Family Law Code section 3044 - an improper legal standard in deciding the custody of Daisy; 2) The evidence was not sufficient to support the custody determination of the trial court; and, 3) The juvenile court improperly excluded Daisy's testimony. Appellant also makes the following arguments on appeal: 1) the Family Law Code does not apply in this dependency proceeding; 2) the court misapplied the presumption in section 3044; and 3) if the presumption applied, appellant had overcome the presumption by a preponderance of the evidence.

Respondent's contentions

Respondent argues that we need not consider appellant's contention that the court erred by applying Family Law Code section 3044 to this case. Respondent's position is that "[s]ection 364 judicial review hearings are limited to whether the court terminates jurisdiction. To that end section 364, subdivision (c), states the failure of a parent who has custody of a child to 'participate regularly in any court ordered treatment plan shall constitute prima facie evidence that the conditions which justified initial assumption of jurisdiction still exist and that continued supervision is necessary.' Thus, Family Code section 3044 and section 364, subdivision (c), serve the same goal of preventing the return of a child to an untreated parent."

Respondent also argues that the trial court expressly found it was not in Daisy's best interest to have her custody changed at this time. This was apparently due to appellant's history of not fully complying with the 2002 court orders that he regularly participate in anger management and domestic violence programs.

Respondent also argues that appellant is seeking the wrong remedy. "The only issue at a section 364 hearing is whether to terminate jurisdiction or set the case for another judicial review." In order for appellant to have the court consider a change of parental custody, he would have had to file a section 388 petition to the court. Respondent argues that "[a]ppellant has cited no authority a court can change custody at a section 364 hearing without a modification petition pursuant to section 388 being filed first."

DISCUSSION

Welfare and Institutions Code section 364 vs. Family Code section 3044[4]

The juvenile court's oral pronouncement of its findings regarding the custody of Daisy made reference to a "*presumption*." During argument, Respondent made several references to section 3044 and the court incorporated the term "presumption" again when it announced its decision regarding custody of the children. This reference strongly suggests that the trial court felt it was making its determination pursuant to section 3044 of the Family Code.

Family Code section 3044 was not the appropriate statutory provision for the juvenile court to apply. Family Code section 3044 applies to a custody decision between divorcing parents and states there is a rebuttable presumption that an award of sole or joint legal custody of a child to a person who has perpetrated domestic violence is "detrimental to the best interest of the child, pursuant to [Family Code] section 3011."[5] Consequently, it was error for the trial court to apply Family Code section 3044.

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[4] Family Code section 3044 provides in relevant part:

"(a) Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child or against the child or the child's siblings within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to Section 3011. This presumption may only be rebutted by a preponderance of the evidence."

[5] Family Code section 3011 provides in relevant part:

"In making a determination of the best interest of the child in a proceeding described in Section 3021, the court shall, among any other factors it finds relevant, consider all of the following:

"(a) The health, safety, and welfare of the child.

"(b) Any history of abuse by one parent or any other person seeking custody against any of the following:

"(1) Any child to whom he or she is related by blood or affinity or with whom he or she has had a caretaking relationship, no matter how temporary.

Although the juvenile court based its decision upon the incorrect statutory provision, "'"[n]o rule is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." [Citation.]' [Citation.]" (*In re Sarah M.* (1991) 233 Cal.App.3d 1486, 1494-1495.)

The juvenile court's order was what was commonly referred to as an "exit order" made pursuant to section 364[6] when the juvenile court terminates its jurisdiction over a child. Therefore we next consider whether the decision of the juvenile court was correct pursuant to section 364.

Welfare and Institutions Code section 364

Courts have applied different standards of review when reviewing orders terminating juvenile court jurisdiction. In *In re Robert L.* (1998) 68 Cal.App.4th 789, Division Four of the Second Appellate District applied an abuse of discretion standard of review to an order terminating juvenile court jurisdiction. (*Id.* at p. 794, 793; see also, *In re Holly H.* (2002) 104 Cal.App.4th 1324, 1327.)

Division One of the Fourth Appellate District, however, applied a substantial evidence standard of review to a termination order in *In re N. S.* (2002) 97 Cal.App.4th

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"(2) The other parent.

"(3) A parent, current spouse, or cohabitant, of the parent or person seeking custody, or a person with whom the parent or person seeking custody has a dating or engagement relationship."

[6] This case is governed by section 364 because Daisy was not removed from her mother's physical custody. (See § 364, subd. (a); *In re Natasha A.* (1996) 42 Cal.App.4th 28, 35.)

167, at page 172. We need not determine which standard of review should be applied because the juvenile court's termination of jurisdiction in this case was proper under either standard.

Section 364 provides that the juvenile court, after hearing any evidence presented by the social worker or the child or the child's parents or guardians, must determine whether continued supervision is necessary. The court is required to terminate its jurisdiction unless it is established by a preponderance of evidence that "the conditions still exist which would justify initial assumption of jurisdiction under Section 300, or that those conditions are likely to exist if supervision is withdrawn." (§ 364, subd. (c); see also *In re N.S.*, *supra*, 97 Cal.App.4th at p. 173.) Termination of jurisdiction "is not conditioned upon the completion of any court services." (*In re Sarah M.*, *supra*, 233 Cal.App.3d at p. 1502, disapproved on other grounds in *In re Chantal S.* (1996) 13 Cal.4th 196.) In addition, the juvenile court may conclude that continued supervision is not necessary for the child's protection because there are custody and visitation orders that restrict unmonitored visitation by an offending parent. (*In re Chantal S.*, *supra,* 13 Cal.4th at p. 204.)

In this case it appears that the juvenile court's decision to terminate jurisdiction was entirely proper. The inquiry required to be made is whether the facts that caused the initial detention still exist. In this case, the detention was caused by the acts of domestic violence by appellant. The mother of the children was at all times, non-offending and had no prior criminal record or any other known disqualifying traits. By the time of the termination order, she had reestablished her housing and the children had been residing with her for some time. This evidence alone supports the conclusion that there was substantial evidence for the decision of the juvenile court to award custody to the mother and terminate jurisdiction. The same evidence supports the conclusion that there was no abuse of discretion.

Exit Orders

The juvenile court properly terminated dependency jurisdiction. (Cf. *In re John W.* (1996) 41 Cal.App.4th 961.) The juvenile court found that jurisdiction no longer was necessary because Daisy was in a safe and nurturing home with her mother. The court then ordered that Daisy's mother was to have joint legal and full physical custody. The "Custody Order Juvenile Final Judgment" filed on February 27, 2004 provides on page one that Appellant is to have visitation with all children "as set forth on Attachment JV-205." The attached "Visitation Order - Juvenile" states that appellant will have visitation with the children on alternate weekends and the parents will split up the children's school vacations and holidays per the order.

These "exit orders" were pursuant to section 362.4, which provides, in relevant part, that when "the juvenile court terminates its jurisdiction over a minor who has been adjudged a dependent child of the juvenile court prior to the minor's attainment of the age of 18 years, . . . the juvenile court on its own motion, may issue . . . an order determining the custody of, or visitation with, the child." The focus of a custody order is the best interests of the child. (*In re Jennifer R.* (1993) 14 Cal.App.4th 704, 712.)

The court also advised the appellant, if dissatisfied with the exit orders, to seek recourse in the family law court. (*In re Alexis W*. (1999) 71 Cal.App.4th 28.) If no superior court action is filed or pending relating to the minor's custody, the juvenile court's "exit order" may be used as the sole basis for opening a file in the superior court of the county in which the parent, who has been given custody, resides. (§ 362.4; *In re Chantal S*., *supra*, 13 Cal.App.4th at page 203.)

Once the family court assumes jurisdiction (exit order is filed in a family law proceeding, or parent brings action to open a family court case) the provisions applicable to counseling orders originating in family court become operative. The juvenile court's exit order is modifiable and family court modification or enforcement will then be subject to the provisions of the Family Code. (*In re John W.*, *supra*, 41 Cal.App.4th at p. 973.)

Exclusion of Daisy's Testimony

Appellant's remaining contention concerns the fact that Daisy was not allowed to testify at the contested family law order hearing. Appellant contends, "Indeed, it is reversible error for the juvenile court to refuse to hear evidence relevant to the formulation of an appropriate exit order regarding custody and visitation. (*In re Michael W*. [(1997)] 54 Cal.App.4th [190,] at 196-197 . . . .)" The judge did not abuse its discretion regarding Daisy's testimony for two reasons. First, the taking of testimony was not mandatory in the family law order hearing, and second, the judge already had some information regarding Daisy's potential input into the hearing.

Furthermore respondent notes that Family Code section 7952, (applicable to dependency matters pursuant to section 361.2, subdivision (2)(d)) states a child has a right to make a statement regarding placement only if the child is being considered for foster placement or if a termination of parental rights is being considered. Here Daisy was simply being continued in the custody of her mother. The record also reflects that the judge was advised of Daisy's desire to live with her father, so any error was not prejudicial.

Sufficiency of Evidence for Termination and Award of Custody to Mother

Our final task is to determine whether there was sufficient evidence to support the termination order. (*In re Sarah M.*, *supra*, 233 Cal.App.3d at p. 1498.) Substantial evidence is evidence that is reasonable in nature, credible and of solid value. (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1065.) The juvenile court's determination must be affirmed if "there is any substantial evidence, whether or not contradicted, which will support the conclusion of the trier of fact." (*In re Rocco M*. (1991) 1 Cal.App.4th 814, 820.)

In this case, the evidence for termination of jurisdiction and evidence for award of custody to the mother is the same. As set forth above, the primary concern is the

children's best interests, and ample evidence supports the juvenile court's determination that it is in their best interest for mother to have sole legal custody.

The evidence presented to the juvenile court overwhelmingly supports its order terminating jurisdiction and awarding mother sole legal custody of the children. Most notably, the mother was never offending and was fully capable of taking care of the children. The children were residing safely in her home and there was no continued necessity for the juvenile court intervention.

Furthermore, these exit orders are not permanent. Should circumstances change in the future appellant is free to seek joint legal custody in the family law court. Custody orders issued by the juvenile court are modifiable. Section 361.2, subdivision (b)(1) provides that "[t]he custody order shall continue unless modified by a subsequent order of the superior court." (See also § 362.4.) All that the juvenile court has done is to transfer the forum for the custody dispute from juvenile to family court. (*In re Sarah M.*, *supra*, 233 Cal.App.3d at p. 1494.)

DISPOSITION

The orders of the juvenile court terminating jurisdiction and issuing certain exit orders regarding Daisy B. are affirmed.

COOPER. P.J.

We concur:

RUBIN, J.

BOLAND, J.